

**BEFORE THE  
COPYRIGHT ROYALTY JUDGES  
Washington, D.C.**

In the Matter of )

ADJUSTMENT OF RATES AND TERMS FOR )  
PREEXISTING SUBSCRIPTION SERVICES )  
AND SATELLITE DIGITAL AUDIO RADIO )  
SERVICES )

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Docket No. 2006-1 CRB DSTRA

**THIRD AMENDED RATE PROPOSAL FOR SOUNDEXCHANGE, INC.**

Pursuant to 37 C.F.R. § 351.4(a)(3), SoundExchange, Inc. ("SoundExchange"), through its undersigned counsel, hereby proposes the following rates for (1) the digital audio transmission of sound recordings by an eligible preexisting satellite digital audio radio service provider ("SDARS") operating under the statutory licenses set forth in 17 U.S.C. § 114; and (2) the making of ephemeral phonorecords necessary to facilitate transmissions by eligible SDARS, 17 U.S.C. § 112(e), during the period January 1, 2007 through December 31, 2012. Pursuant to 37 C.F.R. § 351.4(a)(3), SoundExchange reserves the right to alter or amend its rate proposal prior to or at the time of submission of findings and conclusions if warranted by the record.

**I. ROYALTY RATES**

**A. Option A — Preferred Rate Structure**

Each transmitting entity providing eligible preexisting satellite digital audio radio services shall pay a monthly fee ("Royalty") (to cover both the 17 U.S.C. § 114 performance license and the § 112(e)(1) license for making ephemeral copies) as follows:

- 1) The Royalty Amount. For each month, the Royalty shall equal the greater of (i) or (ii) below, as (ii) is adjusted pursuant to the CPI Increase set out in (3) below:

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a) For every month that the SDARS has publicly reported that its number of Subscriptions is a number less than 9 million Subscriptions:

i) 8% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

ii) \$0.85 per month per Subscription.

b) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 9 million Subscriptions and less than 11 million Subscriptions:

i) 10% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

ii) \$1.15 per month per Subscription.

c) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 11 million Subscriptions and less than 13 million Subscriptions:

i) 12% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

ii) \$1.45 per month per Subscription.

d) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 13 million Subscriptions and less than 15 million Subscriptions:

i) 14% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

ii) \$1.80 per month per Subscription.

e) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 15 million Subscriptions and less than 17 million Subscriptions:

i) 17% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

ii) \$2.25 per month per Subscription.

f) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 17 million Subscriptions and less than 19 million Subscriptions:

i) 20% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

ii) \$2.65 per month per Subscription.

g) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 19 million Subscriptions:

i) 23% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

ii) \$3.00 per month per Subscription.

2) Subscription. For purposes of the calculation of the royalty amount set out in (1) above, a "Subscription" means the number of ending or total ending subscribers reported by an SDARS in its publicly filed 10-Q or 10-K report or, in the event that an SDARS ceases to be publicly traded, such other public report as possesses similar indicia of reliability.

3) CPI Increases. Each year of the license period, beginning on January 1, 2008, the per subscriber rate shall increase according to the percent change in the CPI-U from November 1 of the year two years prior to the year in which payments are to be made to November 1 of the year prior to the year in which payments are to be made. For example, in January 2008 the rate shall be adjusted based on the percentage increase in the CPI-U from November 1, 2006 through November 1, 2007.

4) Ephemeral Fees. With respect to each of the rates specified above, the royalty payable under 17 U.S.C. § 112(e) for the making of ephemeral copies used solely by the SDARS Service to facilitate transmissions for which it pays royalties shall be deemed to be included within, and to comprise 8.8% of, such royalty payments.

5) Services Covered. For purposes of this section, SDARS shall include the services offered by XM Satellite Radio, Inc., and Sirius Satellite Radio, Inc., their successors and assigns (if such successors and assigns are eligible preexisting satellite digital audio radio services as defined in § 114(j)(10)), to the extent those services are making digital audio transmissions of sound recordings subject to § 114. Any other services offered by either entity shall not be covered by the rates set forth in this proposal.

**B. Option B**

As an alternative to the preferred rate structure set forth above in "Option A," SoundExchange hereby proposes the following<sup>1</sup>:

Each transmitting entity providing eligible preexisting satellite digital audio radio services shall pay a monthly fee ("Royalty") (to cover both the 17 U.S.C. § 114 performance license and the § 112(e)(1) license for making ephemeral copies) as follows:

1) The Royalty Amount. For each month, the Royalty shall equal the amount set out below, adjusted pursuant to the CPI Increase set out in (4) below:

a) For every month that the SDARS has publicly reported that its number of Subscriptions is a number less than 9 million Subscriptions, a Royalty of \$0.0000028 per Subscription per month for each Broadcast of a Sound Recording for the first 150,000 Sound Recordings Broadcast each month, and \$0.0000008 per Subscription per month for each Broadcast of a Sound Recording in excess of 150,000 Sound Recording Broadcasts each month.

b) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 9 million Subscriptions and less than 11 million Subscriptions, a Royalty of \$0.0000038 per Subscription per month

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<sup>1</sup> This Option B is not SoundExchange's preferred proposed rate structure and is being proposed only in the event that the Judges prefer a per-play or per-broadcast/per-subscriber metric. The methodology underpinning this approach, as well as a discussion of the potential deficiencies and pitfalls in using any per-play or per-broadcast metric, are set forth in the Written Rebuttal testimony of Dr. Michael Pelcovits, at 19-26. The royalties in Option B are calculated to result in the same royalty payments as set out in Option A above, assuming the same number of sound recording broadcasts as in 2006, based on the annual compensable plays assumed in the Rebuttal Testimony of Dr. John R. Woodbury, at 22, with 50% of the royalty recovered in the first 150,000 sound recordings each month, and 50% of the royalty recovered in the remaining sound recordings broadcast each month.

for each Broadcast of a Sound Recording for the first 150,000 Sound Recordings Broadcast each month, and \$0.0000011 per Subscription per month for each Broadcast of a Sound Recording in excess of 150,000 Sound Recording Broadcasts each month.

c) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 11 million Subscriptions and less than 13 million Subscriptions, a Royalty of \$0.0000048 per Subscription per month for each Broadcast of a Sound Recording for the first 150,000 Sound Recordings Broadcast each month, and \$0.0000014 per Subscription per month for each Broadcast of a Sound Recording in excess of 150,000 Sound Recording Broadcasts each month.

d) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 13 million Subscriptions and less than 15 million Subscriptions, a Royalty of \$0.0000060 per Subscription per month for each Broadcast of a Sound Recording for the first 150,000 Sound Recordings Broadcast each month, and \$0.0000018 per Subscription per month for each Broadcast of a Sound Recording in excess of 150,000 Sound Recording Broadcasts each month.

e) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 15 million Subscriptions and less than 17 million Subscriptions, a Royalty of \$0.0000075 per Subscription per month for each Broadcast of a Sound Recording for the first 150,000 Sound Recordings Broadcast each month, and \$0.0000022 per Subscription per month for each Broadcast of a Sound Recording in excess of 150,000 Sound Recording Broadcasts each month.

f) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 17 million Subscriptions and

less than 19 million, a Royalty of \$0.0000088 per Subscription per month for each Broadcast of a Sound Recording for the first 150,000 Sound Recordings Broadcast each month, and \$0.0000026 per Subscription per month for each Broadcast of a Sound Recording in excess of 150,000 Sound Recording Broadcasts each month.

g) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 19 million Subscriptions, a Royalty of \$0.0000100 per Subscription per month for each Broadcast of a Sound Recording for the first 150,000 Sound Recordings Broadcast each month, and \$0.0000030 per Subscription per month for each Broadcast of a Sound Recording in excess of 150,000 Sound Recording Broadcasts each month.

2) Subscription. For purposes of the calculation of the royalty amount set out in (1) above, a "Subscription" means the number of ending or total ending subscribers reported by an SDARS in its publicly filed 10-Q or 10-K report, or, in the event that an SDARS ceases to be publicly traded, such other public report as possesses similar indicia of reliability.

3) Broadcast. For purposes of the calculation of the royalty amount set out in (1) above, a "Broadcast" is an audio transmission made by an SDARS operating under the statutory licenses set forth in 17 U.S.C. § 114 of a performance of a Sound Recording, or of any part of a Sound Recording.<sup>2</sup> Sound Recording has the meaning it has in 17 U.S.C. §§ 106, 114, and includes, without limitation, recordings subject to the statutory license performed on the SDARS' music, comedy, children's, sports or other channels.

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<sup>2</sup> Only for the purposes of this Royalty Rate, "Broadcast" therefore has a different meaning than it has in 17 U.S.C. § 114(j)(3). "Broadcast" refers to each Sound Recording performed by an SDARS, without regard to the number of subscribers that may be receiving or listening to that Broadcast.

4) CPI Increases. Each year of the license period, beginning on January 1, 2008, the Royalty rate shall increase according to the percent change in the CPI-U from November 1 of the year two years prior to the year in which payments are to be made to November 1 of the year prior to the year in which payments are to be made. For example, in January 2008 the rate shall be adjusted based on the percentage increase in the CPI-U from November 1, 2006 through November 1, 2007.

5) Ephemeral Fees. With respect to each of the rates specified above, the royalty payable under 17 U.S.C. § 112(e) for the making of ephemeral copies used solely by the SDARS Service to facilitate transmissions for which it pays royalties shall be deemed to be included within, and to comprise 8.8% of, such royalty payments.

6) Services Covered. For purposes of this section, SDARS shall include the services offered by XM Satellite Radio, Inc., and Sirius Satellite Radio, Inc., their successors and assigns (if such successors and assigns are preexisting satellite digital audio radio services as defined in § 114(j)(10)), to the extent those services are making digital audio transmissions of sound recordings subject to § 114. Any other services offered by either entity shall not be covered by the rates set forth in this proposal.



## II. TERMS

SoundExchange proposes terms as described in the written direct and rebuttal statements of Barrie Kessler and as set forth in the attached Proposed Regulatory Language for Terms for Preexisting Satellite Digital Audio Radio Services. Pursuant to Section 351.4(a)(3), SoundExchange reserves the right to propose alternative or additional terms prior to or at the time of submission of findings and conclusions.

Respectfully submitted,

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Dated: July 23, 2007

### CERTIFICATE OF SERVICE

I, Albert Peterson, hereby certify that a copy of the foregoing motion has been served this 6th day of August, 2007 by electronic mail and overnight mail to the following persons:

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## **REGULATORY LANGUAGE IMPLEMENTING SOUNDEXCHANGE'S PROPOSED RATES AND TERMS**

### **PART 38\_ -- RATES AND TERMS FOR SUBSCRIPTION TRANSMISSIONS AND THE REPRODUCTION OF EPHEMERAL RECORDINGS BY PREEXISTING SATELLITE DIGITAL AUDIO RADIO SERVICES**

#### **§ 38\_.1 General**

(a) Scope. This part 38\_ establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by Licensees in accordance with the provisions of 17 U.S.C. § 114, and the making of Ephemeral Recordings by Licensees in accordance with the provisions of 17 U.S.C. § 112(e), during the period January 1, 2007, through December 31, 2012.

(b) Legal compliance. Licensees relying upon the statutory licenses set forth in 17 U.S.C. § 112 and § 114 shall comply with the requirements of those sections, the rates and terms of this part, and any other applicable regulations.

(c) Relationship to voluntary agreements. Notwithstanding the royalty rates and terms established in this part, the rates and terms of any license agreements entered into by Copyright Owners and Licensees shall apply in lieu of the rates and terms of this part to transmission within the scope of such agreements.

#### **§ 38\_.2 Definitions**

For purposes of this part, the following definitions shall apply:

(a) "Collective" is the collection and distribution organization that is designated by the Copyright Royalty Judges. For the 2007-2012 license period, the Collective is SoundExchange, Inc.

(b) "Copyright Owners" are sound recording copyright owners who are entitled to royalty payments made under this part pursuant to the statutory licenses under 17 U.S.C. § 112(e) and § 114(f).

(c) "Ephemeral Recording" is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. § 114(f), and subject to the limitations specified in 17 U.S.C. § 112(e).

(d) "Licensee" is a person that has obtained a statutory license under 17 U.S.C. § 114, and the implementing regulations, to make transmissions over a preexisting satellite digital audio radio service ("SDARS") (as defined in 17 U.S.C. 114(j)(10)), and has obtained a statutory license under 17 U.S.C. § 112(e), and the implementing regulations, to make Ephemeral Recordings for use in facilitating such transmissions.

(e) "Performers" means the independent administrators identified in 17 U.S.C. § 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. § 114(g)(2)(D).

(f) "Qualified Auditor" is a Certified Public Accountant.

(g) "Revenue" is all revenue paid or payable to an SDARS that arises from the operation of the SDARS service, including but not limited to subscription revenue, advertising and sponsorship revenue, and all other revenue related to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10), and excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services, as defined in 17 U.S.C. § 114(j)(10).

(h) "Subscription" is, as used in Section 38.3(a)(1), the number of ending or total ending subscribers reported by an SDARS in its publicly filed 10-Q or 10-K report, or, in the event that an SDARS ceases to be publicly traded, such other public report as possesses similar indicia of reliability.

(i) "Term" means the period commencing January 1, 2007 and continuing through December 31, 2012.

**§ 38.3 Royalty fees for the public performance of sound recordings and for ephemeral recordings**

(a) Royalty rates and fees for eligible digital transmissions of sound recordings made pursuant to 17 U.S.C. § 114 by means of digital audio transmissions through a Licensee's SDARS, and the making of ephemeral recordings pursuant to 17 U.S.C. § 112 to facilitate digital audio transmissions through a Licensee's SDARS, are as follows:

(1) The Royalty Amount. For each month, a Licensee shall pay a monthly fee ("Royalty") equal to the greater of (i) or (ii) in subparts (a) through (g) below, as appropriate, as (ii) is adjusted pursuant to the CPI Increase set out in (2) below:

(a) For every month the SDARS has publicly reported that its number of Subscriptions is a number less than 9 million Subscriptions:

(i) 8% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

(ii) \$0.85 per month per Subscription.

(b) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 9 million Subscriptions and less than 11 million Subscriptions:

(i) 10% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

(ii) \$1.15 per month per Subscription.

(c) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 11 million Subscriptions and less than 13 million Subscriptions:

(i) 12% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

(ii) \$1.45 per month per Subscription.

(d) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 13 million Subscriptions and less than 15 million Subscriptions:

(i) 14% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

(ii) \$1.80 per month per Subscription.

(e) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 15 million Subscriptions and less than 17 million Subscriptions:

(i) 17% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

(ii) \$2.25 per month per Subscription.

(f) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 17 million Subscriptions and less than 19 million Subscriptions:

(i) 20% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

(ii) \$2.65 per month per Subscription.

(g) For every month after the SDARS has publicly reported that its number of Subscriptions is a number equal to or more than 19 million Subscriptions:

(i) 23% of all revenue paid or payable to the SDARS, excluding only revenues that are entirely unrelated to the provision of preexisting satellite digital audio radio services as defined in 17 U.S.C. § 114(j)(10); or

(ii) \$3.00 per month per Subscription.

(2) **CPI Increases.** Each year of the license period, beginning on January 1, 2008, the per subscriber rate shall increase according to the percent change in the CPI-U from November 1 of the year two years prior to the year in which payments are to be made to November 1 of the year prior to the year in which payments are to be made. For example, in January 2008 the rate shall be adjusted based on the percentage increase in the CPI-U from November 1, 2006 through November 1, 2007.

(3) **Ephemeral Fees.** With respect to each of the rates specified above, the royalty payable under 17 U.S.C. § 112(e) for the making of ephemeral copies used solely by the SDARS Service to facilitate transmissions for which it pays royalties shall be deemed to be included within, and to comprise 8.8% of, such royalty payments.

(4) **Services Covered.** For purposes of this section, SDARS shall include the services offered by XM Satellite Radio, Inc., and Sirius Satellite Radio, Inc., their successors and assigns (if such successors and assigns are preexisting satellite digital audio radio services as defined in § 114(j)(10)), to the extent those services are making digital audio transmissions of sound recordings subject to § 114(j)(10). Any other services offered by either entity shall not be covered by the rates set forth herein.

#### **§ 38\_.4 Terms for making payment of royalty fees and statements of account**

(a) **Payment to the Collective.** A Licensee shall make the royalty payments due under § 38\_.3 to the Collective.

(b) **Designation of the Collective.**

(1) Until such time as a new designation is made, SoundExchange, Inc., is designated as the Collective to receive statements of account and royalty payments from Licensees due under § 38\_.3 and to distribute such royalty payments to each Copyright Owner and Performer, or their designated agents, entitled to receive royalties under 17 U.S.C. § 112(e) or § 114.

(2) If SoundExchange, Inc. should dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by a successor Collective upon the fulfillment of the requirements set forth in paragraph (b)(2)(i) of this section.

(i) By a majority vote of the nine Copyright Owner representatives and the nine Performer representatives on the SoundExchange board as of the last day preceding the condition precedent in paragraph (b)(2) of this section, such representatives shall file a petition with the Copyright Royalty Judges designating a successor to collect and distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. § 112(e) or § 114 that have themselves authorized such Collective.

(ii) The Copyright Royalty Judges shall publish in the Federal Register within 30 days of receipt of a petition filed under paragraph (b)(2)(i) of this section an order designating the Collective named in such petition.

(c) Monthly payments. A Licensee shall make any payments due under § 38\_.3 on a monthly basis on or before the 45<sup>th</sup> day after the end of each month, except that payments due under § 38\_.3 for the period beginning January 1, 2007, through the last day of the month in which the Copyright Royalty Judges issue their final determination adopting these rates and terms shall be due 45 days after the end of such period. All payments shall be rounded to the nearest cent.

(d) Late payments, statements of account and reports of use. A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment and/or statement of account and/or report of use received by the Collective after the due date. Late fees shall accrue separately for each of the above components (payment, statements of account, and reports of use) from the due date until each such component is properly received by the Collective.

(e) Statements of account. Any payment due under § 38\_.3 shall be accompanied by a corresponding statement of account. A statement of account shall contain the following information:

- (1) Such information as is necessary to calculate the accompanying royalty payment;
- (2) The name, address, business title, telephone number, facsimile number (if any), electronic mail address and other contact information of the person to be contacted for information or questions concerning the content of the statement of account;
- (3) The handwritten signature of a duly authorized agent of the Licensee;
- (4) The printed or typewritten name of the person signing the statement of account;
- (5) The date of signature;
- (6) The title or official position held in the partnership or corporation by the person signing the statement of account;
- (7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

"I, the undersigned officer or representative of the Licensee, have examined this statement of account and hereby state that it is true, accurate, and complete to my knowledge after reasonable due diligence."

(f) Distribution of royalties.

(1) The Collective shall promptly distribute royalties received from Licensees to Copyright Owners and Performers, or their designated agents, that are entitled to such royalties. The Collective shall only be responsible for making distributions to those Copyright Owners, Performers, or their designated agents who provide the Collective with such information as is necessary to identify the correct recipient. The Collective shall distribute royalties on a basis that values all performances by a Licensee equally based upon the information provided under the reports of use requirements for Licensees contained in § 38\_9 of this chapter.

(2) If the Collective is unable to locate a Copyright Owner or Performer entitled to a distribution of royalties under paragraph (f)(1) of this section within 3 years from the date of payment by a Licensee, such royalties shall be handled in accordance with Section 38\_8.

(g) Retention of records. All books and records (including but not limited to source data) of a Licensee and of the Collective relating to calculation, payment and distribution of royalties shall be kept for a period of not less than the prior 3 calendar years.

#### **§ 38\_5 Confidential information**

(a) Definition. For purposes of this part, "Confidential Information" shall include the statements of account and any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

(b) Exclusion. Confidential Information shall not include documents or information that at the time of delivery to the Collective are public knowledge. The party claiming the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) Use of Confidential Information. In no event shall the Collective use any Confidential Information for any purpose other than royalty collection and distribution and activities related directly thereto.

(d) Disclosure of Confidential Information. Access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Collective, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, for the purpose of



performing such duties during the ordinary course of their work and who require access to the Confidential Information;

(2) An independent and Qualified Auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Collective with respect to verification of a Licensee's statement of account pursuant to § 38\_.6 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty distributions pursuant to § 38\_.7;

(3) Copyright Owners and Performers, including their designated agents, whose works have been used under the statutory licenses set forth in 17 U.S.C. § 112(e) and § 114(f) by the Licensee whose Confidential Information is being supplied, subject to an appropriate confidentiality agreement, and including those employees, agents, attorneys, consultants and independent contractors of such Copyright Owners and Performers and their designated agents, subject to an appropriate confidentiality agreement, for the purpose of performing their duties during the ordinary course of their work and who require access to the Confidential Information; and

(4) In connection with future proceedings under 17 U.S.C. § 112(e) and § 114(f) before the Copyright Royalty Judges, and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings or the courts.

(e) Safeguarding of Confidential Information. The Collective and any person identified in paragraph (d) of this section shall implement procedures to safeguard against unauthorized access to or dissemination of any Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to the Collective or person.

#### **§ 38\_.6 Verification of royalty payments**

(a) General. This section prescribes procedures by which the Collective may verify the royalty payments made by a Licensee.

(b) Frequency of verification. The Collective may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) Notice of intent to audit. The Collective must file with the Copyright Royalty Judges a notice of intent to audit a particular Licensee, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all parties.

(d) Acquisition and retention of report. The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Collective shall retain the report of the verification for a period of

not less than 3 years.

(e) Acceptable verification procedure. An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) Consultation. Before rendering a written report to the Collective, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that an appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) Costs of the verification procedure. The Collective shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

#### **§ 38.7 Verification of royalty distributions**

(a) General. This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty distributions made by the Collective; provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or Performer and the Collective have agreed as to proper verification methods.

(b) Frequency of verification. A Copyright Owner or Performer may conduct a single audit of the Collective upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior 3 calendar years, but no calendar year shall be subject to audit more than once.

(c) Notice of intent to audit. A Copyright Owner or Performer must file with the Copyright Royalty Judges a notice of intent to audit the Collective, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Collective. Any audit shall be conducted by an independent and Qualified Auditor identified in the notice, and shall be binding on all Copyright Owners and Performers.

(d) Acquisition and retention of report. The Collective shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than 3 years.

(e) Acceptable verification procedure. An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards

by an independent and Qualified Auditor, shall serve as an acceptable verification procedure for all parties with respect to the information that is within the scope of the audit.

(f) Consultation. Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Collective in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Collective reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) Costs of the verification procedure. The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Collective shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

#### **§ 38\_.8 Unclaimed funds**

If the Collective is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty distribution under this part, the Collective shall retain the required payment in a segregated trust account for a period of 3 years from the date of distribution. No claim to such distribution shall be valid after the expiration of the 3-year period. After expiration of this period, the Collective may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. § 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any State, including but not limited to state escheat statutes.

#### **§ 38\_.9 Reports of use**

(a) Reports of Use. Licensees shall deliver to SoundExchange on a monthly basis notice of use of their sound recordings on all channels.

(b) Delivery and Format. Licensees shall deliver Reports of Use to SoundExchange by no later than the 45th day after the close of each month. Unless otherwise agreed to by a Licensee and the Collective, Reports of Use shall be delivered and formatted in accordance with the Copyright Royalty Judges' regulations for the delivery and format of Reports of Use of sound recordings for the statutory licenses issued on October 6, 2006 and embodied at 79 Fed. Reg. 59010.

(c) Content.

(1) A "Report of Use of Sound Recordings under Statutory License" shall be identified as such by prominent caption or heading, and shall include census reporting of a Licensee's actual playlist for each channel and each day of the reported month. Each playlist shall include a consecutive listing of every recording actually transmitted, including musical, spoken word and comedy recordings, and shall contain the following information in the following order for all sound recordings, including sound recordings played on news, talk, sports or other non-music

channels, and including sound recordings played in programming provided to a Licensee by a third party:

- (A) The name of the service or entity;
- (B) The channel;
- (C) The sound recording title;
- (D) The featured recording artist, group, or orchestra;
- (E) The retail album title;
- (F) The marketing label of the commercially available album or other product on which the sound recording is found;
- (G) The catalog number;
- (H) The International Standard Recording Code (ISRC) embedded in the sound recording, where available and feasible;
- (I) Where available, the copyright owner information provided in the copyright notice on the retail album or other product (e.g., following the symbol ® (the letter P in a circle) or, in the case of compilation albums created for commercial purposes, in the copyright notice for the individual sound recording;
- (J) The date of transmission;
- (K) The time of transmission; and
- (L) The release year of the retail album or other product (as opposed to an the individual sound recording), as provided in the copyright notice on the retail album or other product (e.g., following the symbol © (the letter C in a circle), if present, or otherwise following the symbol ® (the letter P in a circle).

(d) **Signature.** Reports of Use shall include a signed statement by the appropriate officer or representative of the Licensee attesting, under penalty of perjury, that the information contained in the Report is believed to be accurate and is maintained by the Service in its ordinary course of business. The signature shall be accompanied by the printed or typewritten name and title of the person signing the Report, and by the date of signature.

(e) **Documentation.** Licensees shall, for a period of at least three years from the date of delivery of the Report of Use, keep and retain a copy of the Report of Use.

(f) **Late reports of use.** Licensees shall pay late fees of 1.5% per month of the revenue owed for the period to which the report of use corresponds, or the highest lawful rate, whichever is lower,

for any report of use received by the Collective after the due date. Late fees shall accrue from the due date until the report of use is received by the Collective.